No. 11634

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. KECK and HARRY K. STAHLER, and E. A. EMERSON and LEWIS EMERSON, husband and wife,

Appellants,

v.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,

Appellee

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

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QUESTIONS INVOLVED IN THE CASE

Was defendant entitled to a directed verdict when the evidence disclosed the plaintiffs purchased a spray material from a third party, which had been handled by defendant as a distributor and wholesaler, applied it to their apple trees and claimed a crop loss, the spray being intended only for agricultural use and the plaintiffs having determined to apply the particular spray material upon being told by defendant, and others, that it had effected satisfactory mildew control the previous year; no other representation being made, and admittedly no cause of action existing in fraud or breach of warranty? The Trial Court held defendant was entitled to a directed verdict.

STATEMENT OF THE CASE

Two causes of action have been consolidated for trial and appeal (R. 268). The plaintiffs claim their 1945 apple crop was damaged as a result of application of a spray called Elgetol 30. It was made by an eastern manufacturer, was handled by defendant as a distributor and was not sold to plaintiffs by defendant but through a local retail dealer. The basis of plaintiffs' suit is alleged negligence in suggesting the use of the product as a mildew control spray to be applied in the so-called "pink" and "calyx" blossom time in the spring

of 1945; contending defendant should have anticipated the injury that occurred to plaintiffs' crop. The Trial Court granted defendant's motion for a directed verdict on the ground that, under the law of the State of Washington, a buyer, admittedly having no cause of action in fraud or misrepresentation, can have no remedy in negligence against a manufacturer or dealer not the immediate vendor unless the article is dangerous to life or limb. Judgment was entered in favor of the defendant and plaintiffs have appealed.

The judgment of the Trial Court must be affirmed for two reasons: First, because the law of the State of Washington precludes recovery for negligence in manufacture or sale of an article against one not in privity with the vendee where fraud is not involved and the article is one which presents no human peril. Secondly, assuming a duty existed, no negligence was proved in this case.

ARGUMENT

THE EVIDENCE

Appellants premise their case primarily on statements, both verbal and printed, made in the spring of 1945, as to the use of "Elgetol 30" as a mildew control, claiming defendant to be guilty of negligence in "recommending" the material as a "pink" and "calyx"

spray in prescribed solutions without testing it for such purpose for a period of three to five years (Appellants' Brief, Page 8).

The evidence shows appellee furnished Elgetol 30 as distributor thereof in Yakima Valley for the first time in 1944 on specific request of local growers who had learned the spray had been used successfully in the east as a commercial thinning agent (R. 182, 191, 213). A number of growers in Yakima Valley used the material for thinning in 1944 with various degrees of success for such purpose with no damage. Its use for this purpose showed a marked mildew control (R. 65, 299, 317, 336). These observations were passed on to the growers by appellee and others (R. 58, 63, 91, 113, 114, 220). As a result, many growers used Elgetol 30 for mildew control in 1945, some with satisfactory results (R. 108, 173, 313, 318, 334, 343), others, including these appellants, claiming injury (R. 108).

Apple growers in this particular vicinity have two serious problems and for both of which they have been constantly seeking new remedies. One is "thinning" (R. 56, 90, 103), the other is "mildew" (R. 91, 114, 142). Apple blossoms come in clusters of five or six and it is necessary to thin the tree to reduce the apple bearing to one apple per blossom cluster (R. 101, 177). Generally, this has been done by hand, which, during the

war period, presented a great problem because of expense and more particularly because of labor shortage (R. 90, 183). If the trees are delayed in thinning, the excess apples grow too large, which in turn affect the quality and kind of crop and the next year's crop (R. 103, 142, 183). The process of chemical thinning is to spray the blossoms at a time when the main or "king" blossom has become pollinized but before the other blossoms have been; the idea being to prevent pollinization of all blossoms except the king in each cluster (R. 101). There are three stages of blossoming, the "pink" (and pre-pink) (R. 34) when the blossoms have not opened up, but show pink; the "full bloom," when the first or king blossom has fully opened and its petals have just begun to fall (R. 101, 134); and the "calyx," when 50 per cent or more of the petals have fallen (R. 202, 221, 319, 343, 373).

Elgetol 30, manufactured by an eastern concern, had been used for commercial thinning in the east since about 1939 with reported success (R. 90, 107, 116). The orchardists heard of this use and demanded the product (R. 182, 213). Appellee obtained the product in time for use in the spring of 1944 or during the 1944 blossom period. A number of growers used it for commercial thinning in this season, applying it generally from the blossom period into the calyx period

with various degrees of success but no damage (R. 65, 135, 173, 299, 318, 336, 343). The only complaint was of underthinning (R. 181).

Appellee had, prior to the war, maintained a staff of experienced and trained fieldmen. It had been the practice of these men not only to advise with the growers concerning spray and other materials but to carry on experiments of new materials themselves. These experiments were conducted in private orchards, the grower giving the company permission to block off part of his orchard and the new agents were applied directly by or under the supervision of appellee (R. 97). During the war period, the staff of appellee in this area was reduced to Dr. Regan, an entomologist, and another with a third traveling over several states (R. 96). Experimentation necessarily had to be practically discontinued. The company did, however, attempt to carry on some experimental work through the growers, by supplying the growers with the material and checking the results (R. 98). In 1944 a few such experiments were carried on with Elgetol 30 as a commercial thinner (R. 97). A number of growers, including appellant Emerson (R. 59), also tried it out for thinning. It was found this use resulted in an effective control of mildew infestation in the trees (R. 99, 135, 173, 298, 336). Mr. Reeves, of the United States Department of

Agriculture, and Mr. Luce, the extension agent (appellants' expert witnesses) had like experience in tests they carried on with the material (R. 91, 113, 114).

Mildew is a fungus (R. 87, 93) which attacks apple trees, chiefly the Jonathan, Delicious, Rome and Winesap varieties. It causes a serious marking or deterioration of the fruit, making it of low grade, and affects the terminal growth of the trees (R. 66). The trees need this terminal growth to continue to produce (R. 66) and so, over a period of time, mildew will cause a serious crop reduction. The standard remedy for mildew control had always been lime and sulphur solution (R. 182) applied in the pink (and pre-pink) and calyx stage of the blossoms (R. 92, 100, 143, 185). Lime and sulphur was objectionable to the orchardist because he could not apply necessary summer oil sprays in the calyx and cover sprays for coddling moth and other insects for a period of 30 days following after using it (R. 68, 93, 136, 211). Summer oil sprays can be applied almost immediately or at most within 10 days after the use of Elgetol (R. 211). Therefore, when the information spread that Elgetol had shown good results as a mildew control when used as a thinning agent, the orchardists were most anxious to try it on their trees in the season of 1945 when mildew was particularly bad in the district (R. 114).

Knowing the serious problem this mildew infestation was to the growers, appellee published its observations in two articles in a pamphlet entitled "The Ortho News," which it distributes to the growers (R. 25). These articles suggested that if the spray be used for mildew control, it be applied in the pink and calyx time and suggested a formula for its solution (Exhibits B, C; R. 26, 28). We have included these articles in the appendix to this brief. It is admitted that no representations other than the purport of these published articles were ever made to appellants or any other growers in the district (R. 138, 145, 188). So far as time of application is concerned it is universally recognized that to get the best results, mildew control sprays must be applied in the pink and calyx periods (R. 99, 109, 143, 186).

It is the appellants' contention appellee is liable for injury resulting to their crops that followed the use of the spray material by reason of making statements, as set forth in the aforesaid printed articles, without first carrying on experiments with its product for a period of three to five years.

WASHINGTON COMMON LAW PRECLUDES ACTION

The Trial Court in giving its reasons for granting appellee's motion for directed verdict, concisely stated

the applicable rule of common law in the State of Washington (R. 262, 267). The Washington common law must be applied by the Federal Courts.

> *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

The general rule, early adopted in this state, that a contractor, manufacturer or vendor is not liable to third parties, who have no contractural relation with him, for negligence in constructing, manufacturing or sale has certain well defined exceptions. These exceptions are set forth in the case of *Mazetti v. Armour* 75 Wash. 622; 135 Pac. 633 (1913).

> "It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule, certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous."

The appellants claim to come within the third exception. This exception was very definitely defined in an earlier case, *Thornton v. Dow*, 60 Wash. 622; 111

Pac. 899 (1910). The exact language of the above quotation is found in this case as a quotation from *McCaffrey v. Mossberg & G. Mfg. Co.*, 23 R. I. 381; 50 Atl. 651; 91 Am. St. Rep. 637; 55 L. R. A. 822. The case of *Thornton v. Dow* involved injuries to spectators to an exhibition where the balcony fell in a newly constructed Armory building in Seattle. The suit was against the contractor who built the Armory. The court denied recovery to the plaintiff and, with reference to this third exception to the general rule of no liability of the manufacturer, stated:

> "The third class of cases, said the court in the case we have just been reviewing, relating to the sale of a thing not in its nature dangerous, rest upon the principle that in such thing there is no general or public duty, but only a duty which arises from contract out of which no duty arises to strangers to the contract. It will be seen in this case that there was a contractual relation between the builders—the owners of the armory and the contractors, which ended with those two parties."

Therefore, the general rule of nonliability of the manufacturer or seller to one not in privity was definitely adopted in this state. The exceptions have been restricted specifically to instrumentalities that involve a human peril.

> *Baxter v. Ford Motor Co.*, 168 Wash. 456; 12 P.(2d) 409;

Bock v. Truck & Tractor, Inc., 18 Wn.(2d) 458; 139 P.(2d) 706;

Cochran v. McDonald, 23 Wn.(2d) 348; 161 P.(2d) 305;

Dobbin v. Pacific Coast Coal Co., 25 Wn.(2d) 190; 170 P.(2d) 642.

In the *Mazetti* case, the Court allowed recovery of damages suffered by reason of impure food manufactured by the defendant and served by the plaintiff in his restaurant. While property damages were allowed, and this is generally the rule in these cases, the Court specifically restricts the rule to instrumentalities of human peril.

The first exception referred to in the rule set out in the *Mazetti* case has from early times concededly applied to articles such as poisons and explosives that are of themselves inherently dangerous to life and limb.

Weiser v. Holzman, 33 Wash. 87; 73 Pac. 797;

Marsh v. Usk Hardware Co., 73 Wash. 543; 132 Pac. 241;

Thomas v. Winchester, 6 N. Y. (2 Selden) 397; 57 Am. Dec. 455.

This exception has had universal application in this state to the sale of food.

Nelson v. West Coast Dairy Co., 5 Wn.(2d) 284; 105 P.(2d) 76;

Flessher v. Carstens Packing Co., 93 Wash. 48; 160 Pac. 14;

Geisness v. Scow Bay Co., 16 Wn.(2d) 1; 132 P.(2d) 740.

These cases all recognize a tort liability founded on public policy holding the manufacturer responsible for a duty voluntarily assumed.

Geisness v. Scow Bay Co., supra.

The cases sometimes speak of liability as a breach of warranty and other times as negligence. Judge Chadwick in the *Mazetti* case refers to this fact and considers it not important.

The last decision in this state, *Dobbin v. Pacific Coast Coal Co.*, supra, specifically calls it "negligence."

The *Mazetti* case was decided in 1913. In 1916, Judge Cardoza, while on the New York Court of Appeals, rendered his justly famous decision, *MacPherson v. Buick Motor Co.*, 217 N. Y. 382; 111 N. E. 1050; Ann. Cases 1916C 440; L. R. A. 1916F, 696. In this case the doctrine of liability for the manufacture of an instrumentality inherently dangerous to life and limb was extended to those made so by the negligence of the manufacturer or dealer; bringing within this first designated exception, found in the *Thornton* and *Mazetti* cases, the automobile cases.

Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.(2d) 409;

Bock v. Truck & Tractor, Inc., 18 Wn.(2d) 458; 139 P.(2d) 706.

The *Baxter* case admittedly can be justified on the ground of fraud as well as the theory of a dangerous instrumentality. It involved the case of an automobile with advertising as to the non-shatterable quality of the windshield. (See opinion in the case of *Dobbin v. Pacific Coast Coal*, 25 Wn.(2d) 190; 170 P.(2d) 642.

It must be remembered that fraud in the State of Washington is any false representation of the material fact susceptible of knowledge.

Tacoma v. Tacoma Light & Water Co., 16 Wash. 288; 47 Pac. 738;

Webster v. Romano Engineering Corp., 178 Wash. 118; 34 P.(2d) 428;

Jacquot v. Farmers Straw Gas Producer Co., 140 Wash. 482; 249 Pac. 984.

Knowledge of the falsity of the statement on the part of the declarant is not essential. It is only essential in the expression of an opinion as the basis of fraud.

Stewart v. Larkin, 74 Wash. 681; 134 Pac. 186;

Webster v. Romano Eng. Corp., 178 Wash. 118; 34 P.(2d) 428.

The case of *Bock v. Truck & Tractor, Inc.*, 18 Wn. (2d) 458; 139 P.(2d) 706, involved the sale of a second-hand car represented to have been completely over-

hauled and safe to operate on the highway. The Court quotes extensively from *MacPherson v. Buick Motor Co.*, 217 N. Y. 382; 111 N. E. 1050, specifically adopting the rule of that case.

> " 'The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser . . .
>
> " 'We hold then, that the principle of *Thomas v. Winchester* (6 N. Y. 397, 57 Am. Dec. 455) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.' "

See also:

Foster v. Ford Motor Co., 139 Wash. 341; 246 Pac. 945;

Murphy v. Plymouth Motor Co., 3 Wn.(2d) 180; 100 P.(2d) 30;

In *Cochran v. McDonald*, 23 Wn.(2d) 348; 161 P. (2d) 305, the plaintiff suffered injuries to his automobile by the use of antifreeze distributed by defendant

and purchased from a service station. In denying liability, the court said:

> "It seems to us in the final analysis of the situation the only basis upon which recovery on the part of the appellant against respondent could be sustained is upon the application of the doctrine of the food cases cited. This field has been so fully covered by our own cases that we find it unnecessary to cite or review those from other jurisdictions. The other cases are in conflict, and neither the courts nor the text writers have been able to reconcile them. When our food cases are critically examined, it will be found that the rules pronounced in them are exceptions to the general rules of the law of sales. The position taken was justified on the ground that, when such an article as food for human consumption is considered, a question of health is involved, and public policy and the ends of social justice demand a rule be applied that will aid in the protection of health.
>
> . . . There is no question of public policy involved in this case, nor can it be said that it is necessary in order to promote social justice to apply the doctrine of the food cases to the facts of this case. There is no question of public health involved because of consuming an unwholesome or poisonous article of food. . . .
>
> We feel that, as no question of public policy is involved, and the reasons for the exception to the general rule of implied warranty in the law of sales applied in the food cases are absent, we would not be warranted in extending the rule of the cases cited to this case and in holding that a wholesaler is liable to a purchaser of the goods from a retailer upon either the theory of an implied warranty of quality or fitness for the purpose intended, or upon the theory that the wholesaler had sold

> an article that ultimately proved dangerous to property when used for the purpose for which it was manufactured."

In this state, liability has been recognized only in the case of food, explosives and automobiles.

Since the commencement of this action, the Washington Supreme Court rendered a decision involving the manufacture and installation of a furnace, *Dobbin v. Pacific Coast Coal Co.*, 25 Wn.(2d) 190; 170 P.(2d) 642. The furnace did not operate properly and "smoked up" the house. The Court analyzed the *Bock* and *Baxter* cases, designating the *Bock* case primarily one of negligence rather than fraud and recognized the *Baxter* case as authority that fraud may be maintained without privity. In the *Dobbin* case, the trial court had first rendered a decision there could be no recovery because there was no privity and on reargument allowed recovery for fraud. The Supreme Court reversed the trial court and held there was no right of recovery, recognizing the correctness of the lower court's first declared opinion.

It is submitted that the rule set forth in *Thornton v. Dow*, 60 Wash. 622; 111 Pac. 899 (1910), is still law in the State of Washington, modified only by the adoption of the principle set forth by Judge Cardoza in the case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382;

111 N. E. 1050. This exception was by Judge Cardoza specifically restricted to articles "such that it is reasonably certain to place life and limb in peril when negligently made."

The New York Court, which rendered this decision, restricted its application by another famous decision, written by the same eminent jurist, *Ultramares Corp. v. Touche*, 174 N. E. 441; 255 N. Y. 170; 74 A. L. R. 1139. In this case the Court denied recovery to a person advancing money relying upon a certified balance sheet prepared by accountants for a third person. It was admitted that the accountants had been guilty of negligence to their employer. The Court refused to extend the principle of negligence to such a situation, contending that the only remedy is one based on fraud and that that fraud did not exist.

> "The suiters thrown out of court because they proved negligence, and nothing else, in an action for deceit, might have ridden to triumphant victory if they had proved the self-same facts, but had given the wrong another label."

The Washington decisions are supported by the weight of authority in American jurisprudence.

Windram Mfg. Co. v. Boston Blacking Co., 131 N. E. 454; 231 N. Y. 18 (cement);

Tompkins v. Quaker Oats Co., 239 Mass. 147; 131 N. E. 456 (chicken feed);

Marsh Wood Products Co. v. Babcock & Wilcox, 240 N. W. 393; 207 Wis. 209;

Kramer v. Mills Lumber Co., 24 F.(2d) 313 (U. S. C. A. 8) (lumber);

Shipp v. Davis, 25 Ala. App. 104; 141 So. 366;

Giberti v. James Barrett Mfg. Co., 266 Mass. 70; 165 N. E. 19 (hot water tank);

Sherwood v. Lax & Abowitz, 259 N. Y. S. 948; 145 Misc. 578, Aff. 262 N. Y. S. 909, 238 App. Div. 799 (holding shoes are not dangerous instrumentalities);

Flies v. Fox Bros. Buick Co., 196 Wis. 196; 218 N. W. 855; 60 A. L. R. 357;

Sperling v. Miller, 47 N. Y. S.(2d) 191 (carpet);

Borg Warner Corp. v. Heine, 128 F.(2d) 657 (U. S. C. A. 6) (applying California common law);

Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638; 100 P.(2d) 723.

APPELLANTS' TWO AUTHORITIES

Appellants admittedly depend on only two cases cited by them as authority for their theory of liability.

Ebers v. General Chemical Co., 310 Mich. 261, 17 N. W.(2d) 176;

E. I. du Pont de Nemours & Co. v. Baridon, 73 F.(2d) 26 (C. C. A. 8).

There is language in both cases to the effect that the exception applicable to instrumentalities dangerous to

life and limb applies to articles dangerous to property in those particular jurisdictions. Appellee admits some jurisdictions have seen fit to extend the doctrine. Washington has specifically limited the rule to articles involving human peril, although it does permit recovery of damages to property.

> *Mazetti v. Armour & Co.*, 75 Wash. 622; 135 Pac. 633.

This is logical because a duty is established in such instances. No duty exists in this state where human peril is lacking.

Both the *Ebers* and the *Du Pont* cases could be justified in their jurisdictions on the theory of fraud. In both, representations of fact had been made and relied upon. Both cases involve suits against the manufacturer of the material. In the *Du Pont* case, a bulb grower had used a powder designated as "Semesan," purchasing it from a third party. The plaintiff claimed his bulblets had been ruined. Judgment for the plaintiff, however, was reversed and the case remanded for a new trial because the Court considered that the jury should pass upon the question whether or not the manufacturer's directions had been followed by the plaintiff and had not been correctly instructed in the matter. In discussing the theory of negligence, the Court cites numerous decisions with reference to the general rule and

its exceptions, including *Baxter v. Ford Motor*, 168 Wash. 456; 12 P.(2d) 409, and *Foster v. Ford Motor*, 139 Wash. 341; 246 Pac. 945. None of the authorities referred to involve an instrumentality dangerous only to property. For authority that the rule should be so extended, the Court cites in particular two California, one South Dakota and one Minnesota cases, to-wit:

Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609; 269 Pac. 975;

White v. Natl. Bank of Commerce, 99 Cal. App. 519; 278 Pac. 915;

Murphy v. Sioux Falls Serum Co., 44 S. D. 421; 184 N. W. 252;

Ellis, et al, v. Lindmark, et al, 177 Minn. 390; 225 N. W. 395.

In the *Minnesota* case, a wholesaler had mislabeled linseed oil as cod liver oil and plaintiff's chickens were poisoned. This clearly falls within the *Mazetti* rule of an article involving human peril with property damage.

Murphy v. Sioux Falls Serum Co., supra, involved a hog cholera serum.

The two California cases were decided as a question of fraud. The *Du Pont* decision recognizes that with reference to the case of *White v. National Bank of Commerce*, supra.

In *Kolberg v. Sherwin-Williams*, there was a definite

misrepresentation of fact concerning the spray used on the orange trees and in particular statements that it had been used on other groves successfully. The evidence showed it was utterly unfit for a spray and that the company had had notice of considerable damage from the use of it.

We have observed that the Sixth Circuit Court in *Borg Warner Corp. v. Heine*, 128 F.(2d) 657, found the common law of California to be the same as the Washington rule.

> *Kalash v. L. A. Ladder Co.*, 34 P.(2d) 481; 1 Cal.(2d) 229;
>
> *Cliff v. Cal. Spray Chem. Co.*, 257 Pac. 99; 83 Cal. 424.

The case of *Ebers v. General Chem. Co.*, 310 Mich. 261; 17 N. W.(2d) 176, clearly involved fraud. The company had notice of damage to the trees at the time the plaintiff purchased the spray. It clearly comes within the rule of the *Kolberg* case and liability, unquestionably, would be recognized in our jurisdiction under authority of the fraud cases.

ASSUMING A DUTY, THERE IS NO NEGLIGENCE

Assuming a duty on the part of appellee corporation to the appellants, still there is no evidence of negligence. Appellants argue that the appellee corporation is liable

because Dr. Regan recommended the use of Elgetol 30 for a mildew control spray before having tested it in the valley for a period of three to five years. It is disputed between the parties as to whether Dr. Regan ever "recommended," or merely "suggested" the use of the material. It is admitted that he made no claims with reference to the qualities of the product except that it had been used as a commercial thinner without injury and during the course of such use was found effective to control mildew. It is admitted that the standard treatment for mildew control is to spray in the "pink" and "calyx" (R. 92, 100, 109, 115, 143, 186) and that it is necessary to effect thinning by commercial agents to spray in full bloom or early calyx (R. 91, 101, 134).

If the statements made by Dr. Regan are in the category of recommendations, such statements cannot be the basis of a suit in negligence any more than for breach of warranty in an ordinary sales transaction. It has been held that recommendations by a druggist or merchant of a particular drug or cosmetic does not of itself create a duty to foresee the results.

Ray v. Burbank & Jones, 61 Ga. 505; 34 Am. Rep. 103;

Bell v. Adler, 11 S. E.(2d) 495; 63 Ga. A. 473.

In the *Ray* case, a druggist recommended a drug to use on an injured horse, stating it had been used by

others successfully. In the *Bell* case, a saleslady said the store highly recommended a cold cream and that it was wonderful and would do no harm to the skin. Liability was denied in both cases.

In *Young v. Parke Davis & Co.*, 49 Pa. Super. 29, a manufacturing chemist was held not liable for injurious application of a drug, even though reference was made in its catalog to statements by another surgeon that he had made the same kind of use of the product with success.

Appellants, Emerson and Stahler (and Stahler is the one responsible for the use of the spray material in the Keck-Stahler orchard) admit they knew that Elgetol 30 was in the experimental stage when they used it (R. 71-72, 81, 137-139).

This fact alone would necessitate the direction by the Court that they had assumed the risk of its use.

McGee v. Bennett, 72 Ga. A. 271; 33 S. E. (2d) 577;

Hollingsworth v. Midwest Serum Co., 183 Iowa 280; 162 N. W. 620.

In the *Hollingsworth* case, the Court said:

> "It is greatly to the interest of the public that effort and experimentation go on. A great degree of success has been attained. Continual discovery is being made. Even though remedies have only

> partial success, they are well worthwhile . . . Both purchaser and seller knew in the use of the article uncertainty of result to some degree was inevitable. It was the duty of the producer to follow the approved methods of production and of testing as generally recognized by those versed in the subject. Under the undisputed testimony he could do no more for general use. If further testing were deemed desirable for added security as to a particular herd, the purchaser had the opportunity to make it upon a few of the particular herd which he was about to inoculate. Before inoculating a herd of 210 pigs, as was done in one case, it might have been more prudent to have first selected 8 pigs and experimented thereon."

In the *McGee* case, the Court held it was proper to introduce pamphlets showing the fungicide involved was in an experimental stage and that the plaintiff was aware of it. Furthermore, the Court specifically upheld an instruction which directed the jury to find for the defendant if they found the damage was caused by weather conditions or method of planting or any reason over which the defendant had no control and if "plaintiff had knowledge that the use of the product was in the experimental stage."

RISK ASSUMED

It is elementary that in the law of sales a warranty will not extend to open visible or known facts concerning the merchandise.

46 Am. Jur. 557, Sec. 377.

By the same legal logic, appellants must be held to have assumed the risk or be guilty of contributory negligence.

Mr. Stahler testified (R. 137-139):

"Q. You did at that time know that Elgetol was in the experimental stage, so far as using it for mildew control was concerned, didn't you?

A. I knew it was new in the valley.

Q. Pardon me?

A. Yes, I knew it was new in the valley, yes, sir.

Q. And you knew that it had been used as a thinner and had in those cases cleaned up the mildew?

A. That's what I had heard.

Q. Nobody had ever told you that it had been used in the pink and calyx before?

A. No.

Q. You assumed that using the Elgetol as you did on the varieties you mentioned was experimental so far as using Elgetol was concerned, didn't you, Mr. Stahler?

A. Well, no; not in my case. I didn't suppose it was experimental.

Q. I mean—not in what case, did you say?

A. I didn't suppose I was experimenting with it when I did it, no.

Q. Well, you remember when I took your deposition March 9, 1946, in Mr. Hawkins' office?

A. Yes, sir.

Q. Before a court reporter. I find these questions

and answers on page 16 of the transcript. I guess I'll have to get a start here: (Reads from page 15)

'Question: Did he (referring to Dr. Regan) ever tell you that Elgetol 30 had been used solely for mildew control?

Answer: No.

Question: He told you, I believe, that they had hoped it would work out, because it had got results on mildew when they used it as a thinner, is that right?

Answer: Yes, sir.'

Q. That's correct so far?

A. That's correct.

'Question: You understand that it was in the experimental stage insofar as using it for mildew alone was concerned?

Answer: Well, he claimed it had been used for mildew before, but I never saw it.

Question: You mean it had been used as a thinner?

Answer: As a thinner, yes, and had cleaned up the mildew.

Question: But so far as using it in the pink and calyx, for the purpose of mildew only, you knew that was experimental?

Answer: Well, I suppose it was.

Question: You assumed it was at that time, I take it?

Answer: Yes.'

Q. You remember those questions and answers?

A. Yes, I remember those.

Q. And they are correct?

A. I guess they are."

And later, referring to Dr. Regan, Mr. Stahler said (R. 145):

> "He just thought it would control it in 1945, if it controlled mildew as a thinner; he thought it would work as a regular mildew spray."

Mr. Emerson testified: (R. 71-72)

"Q. Did you ever talk with or know any individual grower or growers that used Elgetol before you used it, in 1945?

A. Had I talked with? * * *

Q. Yes, did you know of any growers that used it, besides yourself, before you started using it in '45?

A. I knew of some that had used it similar to what I had used it, late in the season.

Q. That is, they had used it in 1944?

A. That's right.

Q. And from what you could learn from these growers, did they get good results in 1944?

A. Some got some burn; that they were not really well pleased with the use of it.

Q. I'm not sure I understand—and they were not pleased?

A. Some were not well pleased with the use of it, and some were.

Q. And the ones that were not well pleased with the use of it, was because they had some burns, is that right?

A. That was the complaint they made to me.

Q. And you knew that before you used it at all in 1945, didn't you?

A. Yes."

And again (R. 81):

"Q. Now, Mr. Emerson, isn't it a fact that Dr. Regan told you that Elgetol 30 had been used for the purpose of thinning?

A. Yes."

The appellants knew the product was new in Yakima Valley so far as mildew agent was concerned and that the only testing the product had in that locality was with particular orchardists the previous year.

DAMAGE NOT FORESEEABLE

Dr. Regan and those connected with the appellee corporation, as reasonable individuals, had no reason to foresee Elgetol 30 might cause injury when used as a mildew control in the spring of 1945. The experts called by the appellants, Mr. Luce and Mr. Reeves, admitted the damage could not be anticipated.

Mr. Luce, Extension Agent in Horticulture for the county and State College (R. 106), admitted that he had testified at a prior trial involving the same use of this chemical as follows: (R. 118)

"Question: Mr. Luce, from what you know of

> Elgetol 30 and its history in the Yakima Valley, I will ask you whether or not Dr. Regan and other agents of the defendant here, the California Spray-Chemical Corporation, should have reasonably anticipated any serious injury from the use of this product, Elgetol 30?
>
> "Answer: Not to my knowledge; that was not the history of the use of Elgetol up to that period."

There is no expert testimony as how the injury was effected by the use of Elgetol. The evidence is that Elgetol 30 was used and damage resulted. There is an assumption by several witnesses that weather was a factor and that the rain following the spray in calyx time may have caused the damage. Mr. Luce gave as his opinion that the damage was caused by either improper application or unseasonable rains (R. 114-115). There is positive evidence that the weather was unusually wet (R. 140, 144, 335, 377). Mr. Liniger, a grower, who testified he had success in the use of the spray in 1945 said, however, that he did have some injury "to the west end of the orchard which was followed by rain." He sprayed in the calyx and had no injury except to this portion of the orchard where the rain followed the spraying (R. 335).

It is estimated that appellee corporation had no reason to anticipate the unseasonable rains, if they were a factor, and there seems to be no other explanation by expert testimony, or otherwise, as to why the orchards were injured.

Moreover, in view of the fact that numerous growers did use the spray, both in the "pink" and "calyx," without injury in 1945 (R. 313, 318, 334, 343), it is submitted that it is conjectural to say the least, to place the blame on appellee.

Where testimony leaves the matter uncertain as to half a dozen causes of injury, the issue cannot be presented to the jury.

> *Patton v. Texas P. & R.*, 179 U. S. 658; 45 L. ed. 361.

Had defendants been able to carry out tests prior to 1945, there is nothing to indicate in the evidence that they would have discovered any harmful effects from its use. In 1945 many growers used the product with success and they express their determination to continue to use it in the future. Witness the experience of growers who testified in this case such as Cecil C. Clark (R. 296), Edward Ketcham (R. 305), D. W. Brackett (R. 320), A. J. Beckwith (R. 341), Lawrence Liniger (R. 331), David H. Shuman (R. 316). All these witnesses used it in 1945 and some in 1946 with no ill effects. Mr. Clark used it as a thinner in 1944 (R. 299) and in 1945 and 1946 for the dual purpose of thinning and mildew control (R. 302). Mr. Ketcham used the product with good results for mildew control and no injury in the calyx and first cover spray in 1945 which

follows almost immediately after the calyx (R. 313). He also used it in 1946 (R. 314). Mr. Shuman used it as a thinner in 1944 and again in 1945, applying it both times in the early calyx period (R. 319). Mr. Brackett sprayed in full bloom with no injury and found the product effective not only for the purpose of thinning and mildew control but to get his trees out of biennial bearing in 1944 and 1945 (R. 323, 324). Mr. Liniger experimented with it in 1944 for thinning, found it effective for mildew and used it again at calyx time in 1945 with no injury except to those trees where the rain followed immediately after spraying (R. 335). Mr. Beckwith used it late in 1944 and in 1945 and 1946 at calyx time with good results and no commercial damage (R. 343).

NO EVIDENCE DR. REGAN DID NOT EXERCISE THE DEGREE OF SKILL AND DILIGENCE REQUIRED OF MEN OF HIS PROFESSION

The manufacture and use of agricultural sprays involves scientific skill and knowledge and negligence in advocating their use must be determined by testimony of experts.

Hill v. Gr. Northern Life Ins. Co., 186 Wash. 167; 57 P.(2d) 405;

Jordan v. Skinner, 187 Wash. 617; 60 P.(2d) 697;

Thomas v. Inland Motor Freight, 190 Wash. 428; 68 P.(2d) 603.

In this case we have no expert testimony that Dr. Regan did not exercise that degree of skill and care that would be required of him as a reasonably capable and careful entomologist. Appellants, after considerable questioning, elicited statements from their two experts, Mr. Luce and Mr. Reeves, that in their opinion it would take two to five years to determine conclusively the characteristics of any spray material (R. 90, 110). Mr. Luce prefaced his answer to the question propounded that he could not answer it so it would be of any value (R. 109-110). This is a long way from saying that an entomologist, knowing the emergent situation in the particular community, is negligent in giving information he has pertaining to a particular use of a particular spray, when to his knowledge it had shown no injury but good results and he honestly believed it was harmless (R. 145, 233).

Mr. Luce collaborated with other experts in an article published in a local newspaper recommending the spray be used in the calyx period for mildew control (R. 111, Exhibits 1 and 2, printed in this appendix).

Mr. Reeves published his findings that the product showed effective control of mildew (R. 93).

If experts such as these could not anticipate any in-

jury, certainly it is unreasonable to say that Dr. Regan is negligent for not doing so. It is not negligence to fail to guard against a bare possibility of injury.

> "Precaution is a duty only so far as there is reason for apprehension." *Smith v. Boston & M. R. R.*, 87 N. H. 246, 177 Atl. 729.

To be free from negligence, a man is not legally bound to safeguard against occurrences that cannot reasonably be expected or contemplated.

> *Hanson v. Washington Water Power Co.*, 165 Wash. 497, 5 P.(2d) 1025.

It is not negligence of a man of science to make a mistake if he has brought to bear a reasonable degree of skill and care.

> *Howatt v. Cartwright*, 128 Wash. 343; 222 Pac. 496;
>
> *Jordan v. Skinner*, 187 Wash. 617; 60 P.(2d) 697;
>
> *Smith v. Beard*, 56 Wyo. 375; 110 P.(2d) 260.

The rule is well expressed in an old admiralty case, *The Tom Lysle*, 48 Fed. 690 (D. C. W. D. Penn.):

> "The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform and, bringing to bear all his professed experience and skill, weighs those

facts and circumstances, and decides upon a course of action which he faithfully attemps to carry out then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence. 'No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called a mistake, but not carelessness.' *Brown v. French,* 104 Pa. St. 604; *Williams v. Le Bar,* 141 Pa. St. 149, 21 Atl. Rep. 525."

CONCLUSION

The common law in the State of Washington restricts actions of negligence against a manufacturer or distributor by persons other than the immediate vendee to cases only involving an instrumentality dangerous to life or limb. If the rule were otherwise the trial court's ruling in dismissing these cases was proper for the reason that there is no evidence from which negligence of the appellee can be inferred.

Measured by the same standard of care exercised by the appellants' experts, the conduct of the appellee corporation was proper. To hold otherwise would be to say that the local growers were not entitled to the benefit of the information the appellee corporation had,

even though it gave them its exact source of that information. The appellants, having no action in fraud or deceit, have no grounds for recovery.

It is respectfully submitted that the judgment of the trial court should be affirmed.

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APPENDIX

(An article appearing in *Yakima Morning Herald*, a daily newspaper, on May 6, 1945)

Fruit Spray Information

Prepared by the county extension service in co-operation with the U. S. Bureau of Entomology and Plant Quarantine and the State Department of Agriculture.

The warm weather recently has hastened the time when the calyx spray will be applied and also has produced the first codling moths in the bait traps this season. First moths were caught by the bureau of entomology and plant quarantine on the night of May 1. This compares with first catches on the night of April 28, last year. The season does not seem to be much different than last year according to apple bloom in the later districts.

Some growers may now be ready to start their calyx spray in the lower valley. At least 75 per cent of the petals should be off the trees and all indication of bee activity have ceased. All hives should have been removed from the orchard prior to starting the calyx spray. It is often best to start spraying the early varieties first as the calyx lobes will undoubtedly close on these varieties first.

Mention was made last week that spraying of pears should not be hurried and that all apple bloom in the immediate area should be well off and bee activity ceased. We feel that this information should still be stressed. Moth activity would indicate that the delay should not be beyond the point, however, when the calyx spray is applied to apples as there have already been a few nights of favorable temperatures for codling moth activity.

Some growers have inquired about applying lime

sulphur to Jonathans on the calyx when a "pink" spray has been missed. We cannot advise this as the control will probably be very poor. We suggest a possible substitute based on results obtained last year from the use of Elgetol as a blossom spray.

This spray when applied during the late blossom period gave good control of mildew. Therefore where the sulphur has been omitted in the "pink" it might be best to consider Elgetol for mildew control at calyx time. This material, we are advised by the manufacturer, can be applied in combination with the lead arsenate. This Elgetol is not the material used in the trunk spray formula. For recommended strength consult the representative.

This article was admitted in evidence as Defendant's Exhibit No. 1 (R. 113).

The following extract from Vol. 17, No. 2, *Ortho News*, April 17, 1945, was admitted in evidence as Plaintiffs' Exhibit B (R. 27):

Mildew Control

Mildew has been severe during the past several years on Jonathans and some other varieties of apples, with some cases of severe injury to D'Anjou and Bartlett pears and to some varieties of peaches. Growers have the choice of the standard treatment with liquid Lime-Sulfur (2 gallons or more in 100) in the "pink," with follow-up sprays of Wettable Sulfur for calyx or later sprays, if necessary.

To some, Sulfur would be objectionable because it delays the use of Summer Oil in the spray schedule. The grower also has a choice of Elgetol which has shown good control of Mildew and can be followed by

Summer Oil in the usual ten-day interval. Suggested dosage—(1) Elgetol 1½ pints in 100 gallons of water in the "pink," when buds are separated in the clusters and before the bloom opens, and (2) Elgetol ½ pint in 100 with 3 pounds of Lead Arsenate in the calyx spray. Note. Be sure the Elgetol is stirred thoroughly in its container before removing the proper dosage. Careful, thorough spraying, with special attention to infected tip growth is essential for Mildew control.

In general, properly timed Mildew control sprays, with high wetting should aid in controlling the bud mite. Ortho Liquid Spreader, 1/6 to 1/4 pint in 100, gives effective wetting with either Lime-Sulfur or Elgetol.

The following excerpt from Vol. 17, No. 3, *Ortho News*, May 9, 1945, was admitted in evidence as Plaintiffs' Exhibit C (R. 28):

Mildew Control Serious Problem

Judging from the number of growers who have asked for advise on the control of Mildew, this disease offers one of the most serious problems confronting orchardists at the present time. Jonathan, Rome, Newtown, Transparent, Gravenstein, and even Winesap apples in some instances, have presented this knotty problem. Bartlett and D'Anjou pears also, in some locations, have yielded a toll to this disease.

The use of Elegtol for the control of Mildew has shown increasing popularity among fruit growers during the last two years. In the first place, growers who have used Elgetol have in most instances been well satisfied with results in checking this disease. At the same time it permits a follow-up of a Summer Oil combination in the usual spread between sprays, which would not be possible where Sulfur has been used. It should be noted, nevertheless, that Elgetol is not a

producer of miracles. Its use, for effective results, requires absolute thoroughness, timely applications and at proper dosage, preferably with a neutral wetting agent, Ortho Liquid Spreader, as outlined in *Ortho News*, No. 2 of this year. Also it is not to be presumed that in the use of a product relatively new under Northwest orchard conditions, all of the "angles" of its peculiarities are fully known.

Mildew Not Susceptible to Single Application Control

In order to protect both fruit and foliage from Mildew infection, an early application in the "pink," after the fruit buds have separated in the clusters and before the bloom opens, is essential. Since some of the leaf buds are not entirely open at the time of the "pink" spray, a follow-up application in the Calyx spray, in combination with Lead Arsenate and Ortho Liquid Spreader—but no Summer Oil—has been suggested. Some cases came to our notice last summer, however, where a single application of Elgetol, at 1 pint dosage in 100, alone or in combination with Lead Arsenate, gave excellent control of Mildew. However, at this late period of infection, the Mildew had already marked the fruit and had severely injured the tip growth.

Other Benefits Possible With ELGETOL

(1) Mite Control—Since some of the apple varieties, severely attacked by Mildew, are often infested by the Bud Mite, there is good reason to believe that the Elgetol treatment will be very effective against this mite, or against any other kinds of mites present on foliage or bark at the time of application.

(2) Tree Stimulation—Quite a number of orchardists have referred to the improved growth on their fruit trees after an Elgetol treatment. In view of the chemical composition of this product, such an effect might be possible, aside from the benefit which would naturally follow after the Mildew had been checked.

(3) Bloom Thinning—While many growers have reported good results with Elgetol for "chemical thinning" at bloom time, there are so many variables which might affect results that growers should be well informed of possible hazards before attempting this practice. It is better to err on the safe side of "some thinning" than to overdo the job.